No. 12,477

IN THE

United States Court of Appeals

For the Ninth Circuit

MARY ZELLMER, as Administratrix of the Estate of Orval Zellmer and MARY ZELLMER, an Individual,

Appellant,

vs.

ACME BREWING CO., a Corporation,

Appellee.

Appellant's Opening Brief

BRUCE WALKUP,
DAN L. GARRETT, JR.,
410 Mills Building,
San Francisco 4, California,
Attorneys for Appellant.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

		Page
I.	Statement of Pleadings and Facts Showing the Jurisdiction of the United States District Court and the United States Court of Appeals	1
	A. The United States District Court Had Jurisdiction Over This Suit by Reason of the Diversity of Citizenship of the Parties Hereto, and Because the Claims of Plaintiff and Appellant Herein Were Each in Excess of Three Thousand ($3,000) Dollars	1
	B. The United States Court of Appeals for the Ninth Circuit Has Jurisdiction to Review the Order of the United States District Court by Reason of the Fact That Said Order Was a Final Decision	3
II.	Statement of the Case	4
III.	Specification of Errors	5
IV.	Argument	6
	A. The Nevada Statute of Limitations on Actions for Wrongful Death Is a Substantive Part of the Right to Sue for Wrongful Death Granted by the State of Nevada, and Accompanies That Right Wherever Enforcement of It Is Sought	6
	B. Since the Death of Appellant's Husband Occurred in the State of Nevada, the Nevada Statute of Limitations Is Applicable When a Suit for Wrongful Death Is Filed in California, Despite the Fact That Section 340(3) of the California Code of Civil Procedure Would Bar the Suit Had the Death Occurred in the State of California	13
	C. When the United States District Court Denied Appellant's Right to Proceed with Her Action for the Wrongful Death of Her Husband, It Committed Reversible Error	18
	D. Appellant's Third Claim for Her Own Personal Injuries, Being a Claim Arising Out of Appellee's Breach of Warranty, Is Controlled by California Code of Civil Procedure 339(1)	19

Pages

CASES

Ackerman v. A. Levy & J. Zentner Co. (1935) 7 Cal. App. 2nd 23; 45 P.2nd 386 26

Basler v. Sacramento Electric, Gas & Ry. Co. (1913) 166 Cal. 33; 134 Pac. 993 22
Boyd v. Clark (1881) 8 Fed. 849 8
Brackett v. Martens (1906) 4 Cal. App. 249, 87 P. 410 26

Calvin v. West Coast Power Co. (1942) 44 Fed. Supp. 783, 788 ..... 6, 10, 16

Davis v. Mills (1904) 194 U.S. 451; 24 Sup. Ct. 692; 48 Law. Ed. 1067 ..... 6, 7
Dodson v. Continental Can Co. (1930) 159 Wash. 589; 294 Pac. 265 11

Keep v. National Tube Co. (1907) 154 Fed. 121 ..... 15, 16

Lattin v. Gillette (1892) 95 Cal. 317; 30 P. 545 ..... 24, 25
Lewis v. Reconstruction Finance Corporation (1949) 177 Fed.2d 654 ..... 17, 18

Maki v. George R. Cooke Co. (1942) 124 Fed.2d 663 ..... 8, 9
Mary Pickford Co. v. Bayly Bros. Inc. (1939) 12 Cal.2d 501; 86 P.2d 102 26
Menke v. Rand Mining Co. (1947) 81 Cal. App. 2nd 169; 183 P. 2nd 755 26

Nelson v. Merced County (1898) 122 Cal. 644; 55 P. 421 23
North Alaska Salmon Co. v. Hobbs, Wall & Co. (1911) 159 Cal. 380; 113 P. 870; 120 P. 27 26

Piller v. Southern Pac. R.R. Co. (1877) 52 Cal. 42 24

Robinson v. Baltimore & Seattle, M. R. Co. (1901) 26 Wash. 484; 67 Pac. 274 11

Pages

Skidmore v. County of Alameda (1939) 13 Cal.2d 534; 90 P.2d 577 23

Southern Cal. Enterprises v. Walter & Co. (1947) 78 Cal. App. 2nd 750; 178 P. 2nd 785 26

Sweet v. Watson's Nursery (1937) 23 Cal. App. 2d 379; 73 P.2d 284 26

Theroux v. Northern Pac. R. Co. (1894) 64 Fed. 84 ..... 8, 14, 15

Vaccarezza v. Sanguinetti (1945) 71 C.A.2d 687 (163 P.2d 470 ..... 19, 20

Wilson v. Massengill (1942) 124 Fed.2d 666 (cert. den., 316 U.S. 686; 62 Sup. Ct. 1274; 86 L.Ed. 1758) 16, 17

STATUTES

California Civil Code, Sec. 1769 26

California Code of Civil Procedure:
Section 339(1) 23, 24, 25, 26, 27
Section 340(3) 5, 13, 18, 19, 21, 22, 23, 25, 26

Nevada Compiled Laws:
Section 8524 12
Section 9194-5 12

Remington's Revised Statutes of Washington, Title 2:
Chapter 3, secs. 155-159 ..... 10, 11

U. S. Code 1291, Title 28 3

U. S. Code 1294(1), Title 28 4

U. S. Code 1391(c), Title 28 3

TEXTS

16 Cal. Juris., Sec. 26 (p. 465) 23

Williston on Sales, Revised Edition, Section 237 ..... 20, 21

No. 12,477

IN THE

United States Court of Appeals

For the Ninth Circuit

MARY ZELLMER, as Administratrix of the Estate of Orval Zellmer and MARY ZELLMER, an Individual,

Appellant,

vs.

ACME BREWING CO., a Corporation,

Appellee.

Appellant's Opening Brief

I. STATEMENT OF PLEADINGS AND FACTS SHOWING THE JURISDICTION OF THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS.

A. The United States District Court Had Jurisdiction Over This Suit by Reason of the Diversity of Citizenship of the Parties Hereto, and Because the Claims of Plaintiff and Appellant Herein Were Each in Excess of Three Thousand ($3,000) Dollars.

The allegations of the complaint filed in the District Court on July 29, 1949, stand uncontroverted herein inso-

far as allegations necessary to establish the jurisdiction of the District Court are concerned. The complaint alleges in Paragraph III of the first claim therein that "At all times mentioned herein, defendant, Acme Brewing Co., was a corporation, organized and existing under and by virtue of the laws of the State of California, and was doing business in the Northern District of California" (Tr. of Rec. 3).

In Paragraph IV of said first claim it is alleged that "At all times mentioned herein, Mary Zellmer was and now is a resident of the State of Nevada" (Tr. of Rec. 3).

These allegations are incorporated and repleaded by Paragraph I of the second claim of said complaint (Tr. of Rec. 5) and again by Paragraph I of the third claim of said complaint (Tr. of Rec. 6).

Reference to the prayer for damages of the said complaint shows that on each of the three claims joined in said complaint, plaintiff and appellant herein prays judgment in excess of Three Thousand Dollars ($3,000.00) (Tr. of Rec. 7, 8).

The jurisdiction of the United States District Court therefore arises by virtue of Title 28, United States Code 1332, which states:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> (1) Citizens of different States:"

The United States District Court for the Northern District of California, Southern Division, was furthermore the proper Court insofar as the question of venue is con-

cerned, by virtue of Title 28, United States Code 1391(c), which states:

> "(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

I. The United States Court of Appeals for the Ninth Circuit Has Jurisdiction to Review the Order of the United States District Court by Reason of the Fact That Said Order Was a Final Decision.

On September 23, 1949, defendant and appellee filed its Motion to Dismiss (Tr. of Rec. 8). On December 28, 1949, the United States District Court made its Order granting the said Motion to Dismiss (Tr. of Rec. 10). This Order was followed on January 23, 1950, by an Order of Dismissal by which the United States District Court ordered that:

> "* * * plaintiff's complaint on file herein, and each cause of action therein, be and the same is hereby dismissed, and the clerk is hereby directed to enter this dismissal of record." (Tr. of Rec. 11).

This Order by dismissing the complaint and each cause of action therein terminated finally all rights of plaintiff and appellant herein in the United States District Court. It is from this Order that appellant filed her Notice of Appeal (Tr. of Rec. 12).

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review this Order by virtue of Title 28, United States Code 1291, which specifically confers jurisdiction to review all final decisions of the

(2) The District Court erred in ordering plaintiff's third claim dismissed.

IV. ARGUMENT

The ultimate question raised by this appeal, with regard to appellant's first and second claims, is whether or not the Statute of Limitation on actions for wrongful death provided by the law of the forum is a bar to the suit when the cause of action still exists under the Statute of Limitations of the state where the death occurred. There is no decision by California courts on this exact point. The Federal court is therefore free to determine the question for itself (*Calvin v. West Coast Power Co.* (1942) 44 Fed. Supp. 783, 788).

When the time limitation set up by the state where the death occurs is a substantive part of and is inherent in the right to recover for a wrongful death, Federal courts, when free to decide the question for themselves, have uniformly applied the limitation of the state where the death occurred, even though the action would be barred had the death occurred in the state where suit was filed.

A. The Nevada Statute of Limitations on Actions for Wrongful Death Is a Substantive Part of the Right to Sue for Wrongful Death Granted by the State of Nevada, and Accompanies That Right Wherever Enforcement of It Is Sought.

The test for determining whether or not such a time limitation, as is here involved, is a matter of substance or a matter of procedure alone was set out by Mr. Justice Holmes in *Davis v. Mills* (1904) 194 U.S. 451; 24 Sup. Ct.

692; 48 Law. Ed. 1067. Justice Holmes stated (at page 454 of 194 U.S.):

> "It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure, and as belonging to the lex fori, as affecting the remedy only, and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction, courts have been willing to treat limitations of time as standing like other limitations, and cutting down the defendant's liability wherever he is sued. The common case is where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced, whether using words of condition or not. *The Harrisburg,* 119 U.S. 199, 30 L.Ed. 358, 7 Sup. Ct. Rep. 140. *But the fact that the limitation is contained in the same section or the same statute is material only as bearing on construction.** It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. *The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right.*"

This test has been uniformly adhered to. And in recent years Federal courts have in fact liberalized its application in order to find that the time limitation supplied by the law of the state where death occurred accompanies the right into jurisdictions where shorter limitations exist.

---

*Emphasis supplied throughout unless otherwise stated.

In *Theroux v. Northern Pac. R. Co.* (1894) 64 Fed. 84, the court, in considering this question, stated (at page 86 of 64 Fed.):

> "It must be accepted, therefore, as the established doctrine, that where a statute confers a new right, which by the term of the act is enforceable by suit only within a given period, *the period allowed for its enforcement is a constituent part of the liability intended to be created, and of the right intended to be conferred.* The period prescribed for bringing suit in such cases is not like an ordinary statute of limitations, which merely affects the remedy."

In *Boyd v. Clark* (1881) 8 Fed. 849, the court stated (at page 852 of 8 Fed.):

> "The true rule I conceive to be this: That where a statute gives a right of action unknown to the common law, and, *either in a proviso to the section conferring the right or in a separate section, limits the time within which an action shall be brought, such limitation is operative in any other jurisdiction wherein the plaintiff may sue.*"

Although the rule of the earlier cases is clearly sufficient to compel a decision that the Nevada limitation is substantive in nature, later cases make such a result inescapable. The question herein involved was considered in *Maki v. George R. Cooke Co.* (1942) 124 Fed.2d 663. The court stated at page 666 of 124 Fed.2d):

> "We see no valid reason why, if a state creates a statute a right non-existent at common law and prescribes in the same statute a limitation period for action which by comity will be applied in the forum of a sister state, *a limitation, though found in a separate statute of the creative state made applicable in express terms to actions commenced upon a liability*

created by statute, should not likewise be recognized and applied in the courts of the forum state.''

The court concluded (at page 666 of 124 Fed.2d):

''Nowhere else in the Minnesota Statutes is a limitation placed upon the right of action created by the ventilation statute of Minnesota, Section 4174. Why should not this limitation accompany the new right created by the statute wherever enforcement of the right is sought, if the substantive law of a sister state is, by comity, to be recognized and enforced?

''To deny the just compulsion of this rhetorical question would be to whittle with a dull blade upon illogical niceties.''

It should be noted that the Minnesota statute was a general one, referring broadly, inter alia, to all actions commenced ''* * * upon a liability created by statute, other than those arising upon a penalty or forefeiture.'' The court further stated:

''The limitation of the Minnesota Statute, Sec. 9191, Mason's Minnesota Statutes of 1927, *seems directed specifically enough to qualify the statutory liability created by the Minnesota Statute,* embraced in Section 4174, idem.

''Section 9191 provides: 'The following actions shall be commenced within six years: 1. Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed. 2. Upon a liability created by statute, other than those arising upon a penalty or forfeiture. * * *' ''

Aside from later liberal decisions, as represented by the *Maki* case, it is apparent from a consideration of the older cases above set forth that in two situations the

Federal courts will hold a time limitation on a cause of action for wrongful death to be substantive in nature. These situations are as follows: (1) Where the limitation is contained in a proviso to the cause of action, and (2) Where the limitation is contained in a different section of the same statute, but is directed specifically to the cause of action for wrongful death.

In *Calvin v. West Coast Power Co.* (1942) 44 Fed. Supp. 783, the court considered a State of Washington statute which enacted both the cause of action for wrongful death and a time limitation thereon into the Code of Civil Procedure of that State. The limitation, which did not even mention actions for wrongful death, was found in a separate chapter and title of the Code from the section creating the cause of action, and was classified generally with all other limitations on actions in the State of Washington in Title 2, Chapter 3 of *Remington's Revised Statutes of Washington,* entitled "Procedure in Courts of Record." The structure of Chapter 3 is as follows:

"CHAPTER 3

LIMITATION OF ACTIONS

§ 155. *Limitations prescribed — Objections, how taken.* Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer.

§ 156. *Actions to be commenced in ten years.* (Setting forth various actions)

§ 157. *Within six years*
(Setting forth various actions)

§ 158. *Within five years*
(Setting forth various actions)

§ 159. *Within three years.*

Within three years:
2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;"

Section 159, Chapter 3, Title 2 of *Remington's Revised Statutes of Washington* embodies seven subdivisions which are directed to various types of actions. Subdivision 2 sets the time limitation on actions for wrongful death (*Robinson v. Baltimore & Seattle,* M. R. Co. (1901) 26 Wash. 484; 67 Pac. 274; *Dodson v. Continental Can Co.* (1930) 159 Wash. 589; 294 Pac. 265).

The court in the *Calvin* case held that this limitation was substantive in nature and inherent in the action for wrongful death when brought in the United States District Court in Oregon, and was controlling there, despite the fact that Oregon statutes provided a shorter limitation on actions for wrongful death. The court stated (at page 790 of 44 Fed. Supp. 789):

> "The three-year limitation of the Washington law was incorporated in the Civil Code of that State, together with the statute permitting action for wrongful death, and thus, these sections may be considered part of the same enactment."

An application of the principles above set out demonstrates that the Nevada statute of limitations on actions for wrongful death is substantive in nature, and should follow the action in the instant case when filed in California. There is no Nevada decision construing this limitation as either substantive in nature or procedural in nature, and this Court is therefore free to decide the question for itself.

A consideration of the history of the Nevada limitation upon wrongful death actions shows that *this limitation and the cause of action for wrongful death created by Nevada law are part of the same statute.* In 1911 the Legislature of Nevada enacted an act entitled *"An Act to Regulate Proceedings in Civil Cases in This State and to Repeal All Other Acts in Relation Thereto."* This Act has been generally denominated the "Civil Practice Act." The cause of action for wrongful death was created by Chapter 69 of the said Act (Sections 9194 and 9195, Nevada Compiled Laws). The time limitation of two years on actions for wrongful death was set by Chapter 4 of the same Act (Section 8524, Nevada Compiled Laws). Chapter 4, Section 25, of the said Act states:

> "Actions other than those for the recovery of real property, can only be commenced as follows:
>
> "Within two years: (5) An action to recover damages for the death of one caused by the wrongful act or neglect of another."

The Nevada Legislature set forth this limitation in a separate section within Chapter 4 of the said Act and excluded all other actions from the limitation of this particular section. The Nevada Legislature could not have

used clearer means to direct this limitation specifically to the action for wrongful death alone, and no other. The time limitation here involved is much more specifically directed to the action for wrongful death than the limitation in the *Calvin* case, and of course, is more specifically directed to this one cause of action than the limitation considered in the *Maki case.* The Nevada time limitation of two years is therefore a substantive part of the cause of action rather than a matter of procedural law only.

B. Since the Death of Appellant's Husband Occurred in the State of Nevada, the Nevada Statute of Limitations Is Applicable When a Suit for Wrongful Death Is Filed in California, Despite the Fact That Section 340(3) of the California Code of Civil Procedure Would Bar the Suit Had the Death Occurred in the State of California.

There are no California decisions on this exact question, and this court is therefore free to decide the matter for itself. Section 340(3) of the California Code of Civil Procedure states:

> § 340. "*Within one year.* Within one year: 3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, *or for injury to or for the death of one caused by the wrongful act or neglect of another,* or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized indorsement;"

It is apparent from reading this section that it does not purport to control or limit rights arising under the laws of another state. To construe the section as limiting such

rights, is to place upon it a strained and unnatural construction, and to impair the rights granted to appellant under the laws of the State of Nevada.

In *Theroux v. Northern Pac. R. Co.* (1894) 64 Fed. 84, the court passed on the exact point here involved, and stated (at page 85 of 64 Fed.):

> "It follows, of course, that, if the courts of another state refuse to permit the cause of action to be sued upon during a part of the period limited by the foreign law, *to that extent they refuse to give effect to the foreign law, and by so doing impair the right intended to be created.* Doubtless, the courts of a state may refuse to enforce a liability unknown to the common law that has been created by the laws of a foreign state or country, but the rule of comity which prevails as between the various states of this Union requires that the courts of each state shall enforce every civil liability that may have been created by the laws of other states, for an act done or omitted within their several territorial jurisdictions, unless the liability so created and sought to be enforced is clearly repugnant to some local law, or is opposed to some well-established public policy of the state whose courts are asked to enforce it. * * * Such being the rule of comity which is generally recognized and enforced, we do not see how the courts of Minnesota, *and much less a federal court sitting in Minnesota,* can well refuse to enforce a liability created by the laws of Montana for a wrongful act or omission of duty resulting in death, which was committed in Montana within three years, and more than two years prior to the institution of the suit, merely because the laws of Minnesota provide, with respect to similar acts committed in Minnesota, that suit shall be

brought within two years. *To refuse to entertain such a suit within three years would be to subtract from the liability, and to impair the right intended to be conferred by the laws of Montana;"*

In *Keep v. National Tube Co.* (1907) 154 Fed. 121, the identical question here involved was again considered. The court stated (at page 124 of 154 Fed.):

"The defendant contends that no action can be maintained on the Minnesota statute in New Jersey after the expiration of the period of 12 months limited in the New Jersey statute. It is true that actions are barred not by the lex loci, but by the lex fori; but the limitation of time within which an action may be instituted under the Minnesota statute, or that within which it may be instituted under the New Jersey statute, is so connected with the right of action itself that it does not operate as a mere limitation of time within which the remedy may be prosecuted. A general statute of limitations curtails a pre-existent common-law right; but the right of action for damages resulting from death is unknown to the common law. It is a new right created by statute for a limited period. In Minnesota that right exists for 2 years; in New Jersey it exists for 12 months. *One who acquires such a right under the New Jersey statute, or under the Minnesota statute, may carry it with him into any jurisdiction where a substantially similar right has been created. Why should the time within which such a right may be enforced be curtailed in a jurisdiction different from that in which the right was created by any statute other than one which, like a general statute of limitations, operates on the remedy only?* The New Jersey statute does not limit the time within which an action may be instituted under the Min-

> nesota statute, for the reason that the New Jersey statute creates no right of action in any case where death has resulted from a wrongful act done in another state."

In *Calvin v. West Coast Power Co.* (1942) 44 Fed. Supp. 783, the court, in considering the identical question here involved, stated (at page 788 of 44 Fed. Supp.):

> "This court must attempt to discover in this situation what the Supreme Court of Oregon would hold *when these exact facts are presented for decision.* No case has been called to the attention of this court where such facts have been ruled upon by any tribunal sitting in Oregon."

The court concluded that the statute of limitations of the State of Washington which allowed a period of three years within which to bring suit for a wrongful death should be applied when suit was filed in the United States District Court in Oregon despite the fact that the shorter limitation prescribed by the State of Oregon had expired prior to the filing of the action. The closing remarks of the court are peculiarly applicable to the situation presented in this appeal. The court stated (at page 790 of 44 Fed. Supp.):

> "It is probable the Supreme Court of Oregon which has indicated a tendency to practical justice will not deny one injured by the death of a principal in another state access to this court while the right of action is alive in the jurisdiction of its origin. *Especially is this true where residents of Oregon have prevented service by remaining out of Washington.*"

The identical question here presented was also considered in *Wilson v. Massengill* (1942) 124 Fed.2d 666.

The court applied the statute of limitations of the state where the death occurred despite the contention that the suit was barred by the statute of limitations of the state where the suit was filed. The court stated (at page 66 of 124 Fed.2d):

> "In a case decided today, Nick Maki v. George R. Cooke Company, 6 Cir., 124 F.2d 663, this court approved, applied and extended the doctrine of Theroux v. Northern Pac. R. Co., 8 Cir., 64 F. 84, that where, by statute, a state creates a cause of action for death by wrongful act and prescribes in the same statute a limitation period for action, such limitation will be applied in the forum of a sister state, even though the period of limitation for like actions in the latter state is shorter. We apply that principle here. We find no indication of a contrary view in the reported cases in Tennessee. Decision upon the point presented was pretermitted in Parsons v. American Trust & Banking Co., 168 Tenn. 49, 58, 73 S.W.2d 698. We are, therefore, free to decide the issue before us upon our own juristic reasoning. This we have done."
>
> (Certiorari denied by the Supreme Court, 316 U.S. 686; 62 Supreme Court 1274; 86 L.Ed. 1758)

The latest case on this exact point is *Lewis v. Reconstruction Finance Corporation* (1949) 177 Fed.2d 654. The court sets forth the two opposing views on the problem here involved, and states (at page 655 of 177 Fed.2d):

> "However, there is a line of opposing authority which takes the view that as to rights of action of a purely statutory nature, such as the so-called wrongful death statutes, the time thereby prescribed for filing suit operates as a limitation of the liability itself as

created by the statute, and not of the remedy alone. It is deemed to be a condition attached to the right to sue. As such, time has been made of the essence of the right, which is lost if the time is disregarded. *The liability and the remedy being created by the same statute, limitation of the remedy must be treated as limitation of the right.*

"In dealing with this conflict of authority, unaided by any decision of this court directly in point, we conclude that the limitation laid down by the law of the state where the fatal injuries occurred should govern, unless the public policy of the forum is clearly opposed. We think this view is better supported by reason and authority.

"The fact that the Nebraska law provides a longer period for filing suit than the District law does not, in our opinion, manifest any conflict in policy between the two jurisdictions. The purpose of both is to create a right of action within a limited period for death occasioned by negligence. It is immaterial that the time for bringing suit differs in the two statutes. The principle underlying both is the same. Weaver v. Baltimore & O. Railroad Co., 1893, 21 D.C. 499, 503."

C. When the United States District Court Denied Appellant's Right to Proceed with Her Action for the Wrongful Death of Her Husband, It Committed Reversible Error.

When the court below applied the one-year limitation on actions for wrongful death contained in the California Code of Civil Procedure 340(3) to appellant's claim for the death of her husband, it violated well established principles of comity, and proceeded directly contrary to the great weight of authority as established by Federal decisions. It is apparent from a study of the Federal deci-

sions on this issue that Federal courts, when free to do so, have unanimously preserved a plaintiff's substantive rights acquired under the laws of one state, when circumstances require that those rights be enforced in a sister state. To do otherwise is to subtract from and impair the validity and effect of the laws of the state in which those rights were acquired. This is particularly true in this case, as it was in the *Calvin* case, since appellee is not doing business in Nevada, and accordingly could not be sued there. Appellee should be required to defend the case on the merits, and, assuming appellant can prove her case, to compensate appellant for the gross injury she has sustained. To do otherwise is to allow a wrongdoer to evade, by a technicality, the responsibility for its neglect of duty. The Federal courts of this country have thoroughly rejected such a position, and have adopted the only stand which is consistent with substantial justice to all parties.

D. Appellant's Third Claim for Her Own Personal Injuries, Being a Claim Arising Out of Appellee's Breach of Warranty, Is Controlled by California Code of Civil Procedure 339(1).

Appellee's liability arises out of an absolute obligation imposed by law. Suits to enforce such a liability are excluded from the scope of California Code of Civil Procedure 340 which sets up the one-year statute of limitations in California. This obligation arises out of a sale of goods and is imposed by law regardless of fault or negligence on appellee's part. In *Vaccarezza v. Sanguinetti* (1945) 71 C.A.2d 687 (163 P.2d 470) the California court

considered the nature of the liability for breach of warranty and stated (at page 689 of 71 C.A.2d):

> "The action is not based upon the negligence of defendants but upon breach of the implied warranty of fitness for the purpose for which purchased (Civ. Code, Sec. 1735). *The section imposes an absolute liability regardless of negligence.* (*Gindraux v. Maurice Mercantile Co.,* 4 Cal.2d 206, 47 P.2d 708; *Jensen v. Berris,* 31 Cal. App. 2d 537; 88 P.2d 220). The warranty applies to the sale of foodstuffs for human consumption, and runs with the goods to the ultimate consumer, there being no requirement of privity between the ultimate consumer and the manufacturer. (*Klein v. Duchess Sandwich Co., Ltd.,* 14 Cal.2d 272; 93 P.2d 799; *Dryden v. Continental Baking Co.,* 11 Cal.2d 33; 77 P.2d 833.)"

The same problem is considered in *Williston on Sales, Revised Edition,* Section 237. The author there states:

> "The effect of an express warranty undoubtedly is to bind the seller absolutely for the existence of the warranted qualities. If an implied warranty is properly called a warranty, the consequences should be similar. *It should make no difference, therefore, whether the seller was guilty of any fault in the matter. Such is the well-settled law of England. And either because of the enactment of the Sales Act or because of an interpretation of the common law most jurisdictions in the United States follow the English rule.* * * * The provisions of the American statute are, so far as this point is concerned, identical in meaning with those of the English Act, *and it seems clear that where either statute provides for a warranty, it means*

an absolute undertaking that the goods possess the warranted quality.''

The author further comments on this question in a footnote to Section 237, stating:

''In Rodgers v. Niles, 11 Ohio St. 48 * * * the court said: *'If the sellers have failed through defect of material procured by themselves, or of workmanship, their contract is broken, whether such defect be latent or visible, and however honest their intention may have been.'* The same rule seems adopted in Leopold v. Van Kirk, 27 Wis. 152. Section 2651 of the Code of Georgia, and section 1771 of the Civil Code of California (now superseded by the Uniform Sales Act) *also seem to impose an absolute liability on the seller irrespective of any fault on his part.* (citing Mary Pickford Co. v. Bayly, 12 Cal.2nd 501; 86 P.2nd 102) *Moreover, the greater number of cases where the seller is held liable as a warrantor with no allegation or proof of negligence necessarily involve the point.''*

When Section 340(3), California Code of Civil Procedure is considered in this connection, it is evident that it was never intended to control the suit for breach of warranty. Section 340, California Code of Civil Procedure states:

''Within one year:

''3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, *or for injury to or for the death of one caused by the wrongful act or neglect of another,* or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement;''.

The meaning of the phrase "caused by the wrongful act or neglect of another" was considered in *Basler v. Sacramento Electric, Gas & Ry. Co.* (1913) 166 Cal. 33; 134 P. 993. The court laid heavy emphasis on the fact that the words were intended to cover those actions where the gravamen of the complaint was the negligence of defendant, and rejected the plaintiff's contention that the negligence of defendant railroad constituted a breach of its contract of carriage. The court stated (at page 36 of 166 Cal.):

> "In Webber v. Herkimer, 109 N. Y. 313; 16 N. E. 358, the question presented was whether or not a statute of limitations limiting the time within which an action to recover damages for 'a personal injury resulting from negligence' was applicable to the pleading in that case. The court held that whether the action was in form one arising *ex contractu* or *ex delicto,* the liability was referable to the common carrier's negligence and came within the statute relating to the limitation upon actions to recover damages for personal injuries and not to that prescribing the time within which a litigant might sue for damages for breach of contract.
>
> "It has been held that the word 'for' means 'by reason of', 'because of' and 'on account of', and that a statute prescribing a limitation on 'actions for injury to the person * * * caused by negligence' should be interpreted to mean 'actions' 'by reason of' or 'because of' or 'on account of' injuries to the person caused by negligence.' Sharkey v. Skilton, 83 Conn. 503, (77 Atl. 950)."

It is clear, therefore, that since this phrase was intended to control those actions which are in essence based

upon the negligence of defendant, all actions which are not based on the negligence or fault of defendant were intended to be excluded. Statutes of limitations are to be strictly construed and to hold that California Code of Civil Procedure 340(3) bars appellant's claim based on breach of warranty would enlarge the scope of this section as limited by the California courts. (*Nelson v. Merced County* (1898), 122 Cal. 644; 55 P. 421; *Skidmore v. County of Alameda* (1939) 13 Cal.2d 534; 90 P.2d 577.)

On the other hand, California Code of Civil Procedure 339(1) is specifically designed to cover the type of action here presented. This section states:

> "Within two years;
> 1. An action upon a contract, obligation or liability not founded upon an instrument in writing, other than that mentioned in subdivision two of section three hundred thirty-seven of this code;"

In discussing the scope of this section, 16 Cal. Juris., Section 26 states (at page 465):

> "*The word 'liability' as used in this section is the most comprehensive of the several terms employed and includes both of the others.* It is synonymous with the word 'responsibility' and includes within its scope contracts, express and implied, *liabilities arising in tort,* and all liabilities connected with instruments in writing but which do not arise therefrom directly or immediately. The section is intended, it has been said, *to include all actions at law, not specially mentioned in other portions of the statute.* If there is a statute expressly providing the time within which suit may be brought upon the particular liability, this section has no application."

This section of the California Code of Civil Procedure is considered by the courts of California as the "general" statute of limitations in this State, and a consideration of its history shows that at one time it covered all actions for personal injuries including those arising by reason of the negligence or fault of the defendant. In *Piller v. Southern Pac. R.R. Co.,* (1877) 52 Cal. 42 the court applied the two-year limitation of this section when plaintiff sued for personal injuries incurred by reason of the defendant's negligence. The California Supreme Court there stated (at page 44 of 52 Cal.):

> "We are of the opinion that the two years' limitation found in the first clause of the first subdivision of sec. 339 is applicable to all actions at law not specifically mentioned in other portions of the statute."

In 1905 the legislature of California amended Sec. 340(3) of the California Code of Civil Procedure to add the words here under consideration, and the section thereafter read as follows:

> "Section Three Hundred and Forty. Within one year.
> "Three—An action for libel, slander, assault, battery, false imprisonment, seduction *or for injury to or for the death of one caused by the wrongful act or neglect of another* or by a depositor against a bank for the payment of a forged or raised check."

The general meaning of Sec. 339(1) of the Code of Civil Procedure remained unchanged, however, and still covered all suits on liabilities *not specifically provided for elsewhere.*

In *Lattin v. Gillette,* (1892) 95 Cal. 317; 30 P. 545, the effect of Sec. 339(1) of the California Code of Civil

Procedure was again considered. The Court stated (at page 318 of 95 Cal.):

> "Section 339 of the Code of Civil Procedure provided that an action upon a 'contract, obligation, or liability,' not founded upon an instrument in writing, must be brought within two years after the cause of action shall have accrued. This provision was declared in *Piller v. Southern Pacific R.R. Co.,* 52 Cal. 44, to be 'applicable to *all actions at law not specifically mentioned in other portions of the statute.*' The word 'liability' is the most comprehensive of the several terms used in this section, and includes both of the others, inasmuch as it is the condition in which an individual is placed after a breach of his contract, *or a violation of any obligation resting upon him.* It is defined by Bouvier to be 'responsibility; the state of one who is bound in law and justice to something which may be enforced by action. *This liability may arise from contracts, either express or implied, or in consequence of torts committed';* and this definition was approved in *Wood v. Currey,* 57 Cal. 209."

It is clear, therefore, that the Legislature of California did not intend to remove actions based on the defendant's breach of warranty from the scope of California Code of Civil Procedure 339(1) by its enactment of the words under discussion into California Code of Civil Procedure 340(3). If the Legislature had intended, by so doing to remove *all* suits for personal injuries from the scope of California Cole of Civil Procedure 339(1), it would have done so with unmistakable clarity by omitting the qualifying words "caused by the wrongful act or neglect of another" from California Code of Civil Procedure 340(3). The addition of these qualifying words limits the type of

actions removed from the scope of the "general" statute of limitations of two years in California, and this limitation confines the cases so removed to those where a personal injury is incurred by reason of the negligence or fault of the defendant. A suit for injuries arising as the result of a breach of warranty is based solely upon an absolute liability imposed by law, and is not dependent upon proof of the defendant's fault or negligence. A suit for this type of liability is therefore within the scope of California Code of Civil Procedure 339(1) prescribing a two-year statute of limitations, inasmuch as there is no specific limitation provided elsewhere.

In suits for a breach of warranty, both express and implied, the California courts have uniformly applied the two-year statute. (*Sweet v. Watson's Nursery* (1937), 23 Cal. App. 2d 379; 73 P.2d 284; *Mary Pickford Co. v. Bayly Bros. Inc.* (1939), 12 Cal.2d 501; 86 P.2d 102; *Brackett v. Martens* (1906), 4 Cal. App. 249, 87 P. 410; *Ackerman v. A. Levy & J. Zentner Co.* (1935), 7 Cal. App. 2nd 23; 45 P. 2nd 386; *Southern Cal. Enterprises v. Walter & Co.* (1947), 78 Cal. App. 2nd 750; 178 P. 2nd 785; *Menke v. Rand Mining Co.* (1947), 81 Cal. App. 2nd 169; 183 P. 2nd 755.)

As a matter of policy, there is no reason to include suits for breach of warranty within the one year limitation. A defendant will not be prejudiced by lapse of time, since in any event a suit based on such a breach cannot be maintained unless the defendant is notified within a reasonable time following the injury that a breach has occurred causing injury. (California Civil Code, Sec. 1769; *North Alaska Salmon Co. v. Hobbs, Wall & Co.* (1911) 159 Cal. 380; 113 P. 870; 120 P. 27.)

On the other hand, in the situation presented by modern distribution methods in the sale of goods, the buyer who suffers damage by breach of warranty may require considerable time in order to pursue the corporate defendant into a jurisdiction where it can be found "doing business."

Particularly is this true when, as in this case, the buyer was rendered violently ill, and was in addition faced with the death of her husband, and the necessary troubles and time-consuming arrangements in connection with such sickness and death (Tr. of Rec. 7).

It is respectfully submitted, therefore, that the court below erred in dismissing appellant's claim for her own personal injuries. As in the case of appellant's separate and distinct claim for damages incurred by reason of her husband's death, the appellee should be ordered to stand trial on the merits for the damages incurred by appellant personally.

Dated: San Francisco, Calif.,
April 10, 1950.

Bruce Walkup,
Dan L. Garrett, Jr.,
410 Mills Building,
San Francisco 4, California,
Attorneys for Appellant.